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Noel Semple

University of Windsor, Faculty of Law

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The Silent Child: A Quantitative Analysis of Children's Evidence in Canadian Custody and Access Cases

Noel Semple*

There are two possible forms of evidence in a custody or access (visitation) case which is determined through adjudication. First, the judge may hear from the adult parties and the witnesses whom they choose to call. Second, the judge may hear "children's evidence," which comes either directly from the child, or from a neutral professional with child-related expertise. To determine the prevalence of children's evidence in Canadian custody and access litigation, the author conducted a quantitative survey of 181 reported decisions from 2009. The central finding was that only 45% mentioned any form of children's evidence. Among the various varieties of children's evidence, assessments (also known as child custody evaluations) were much more common than legal representation of children or direct evidence from children. The article concludes by contrasting the primacy of the child in custody and access doctrine with the reality that the children involved appear to be effectively silent in the majority of the adjudicated cases.

1. INTRODUCTION

Canadian judges must decide custody and access disputes through exclusive reference to the best interests of the child involved. So says the law.¹ However, the procedure by which the judge receives information and argument before making the decision is not characterized by an exclusive focus on the child. Adults, not children, have the right to commence custody and access litigation. Adults, not children, choose if and when to terminate it through settlement. The present article focuses on the evidence available to the judge in a private custody or access dispute. Is the evidence also controlled by the adult litigants, or is it *children's evidence*? Children's evidence (which will be defined more comprehensively below) has the distinguishing feature of coming not from one of the adult litigants, but rather from the child or from a professional with child-related expertise.

This inquiry is made especially pertinent by the law's stated intention to put children's interests first when parenting arrangements are in dispute. If the interests of the adult litigants are indeed legally irrelevant (as the law provides), it would be odd to find adults controlling most of the information which comes before the deci-

* Ph.D. Candidate, Osgoode Hall Law School, York University. I am grateful to Professor Bryn Greer-Wootten of the Institute for Social Research (York University) for his assistance with the statistical tests used in this article.

¹ *Divorce Act*, R.S.C. 1985, (2d Supp.), c. 3, at 4-5 s. 16(8), and provisions to the same effect in all provincial and territorial family law statutes. The Supreme Court of Canada has affirmed this principle in *Van de Perre v. Edwards*, 2001 CarswellBC 1999, 2001 CarswellBC 2000, 2001 SCC 60, [2001] 2 S.C.R. 1014 (S.C.C.).

sion-maker. If the children's interests are the only important interests, then one might expect judges to be hearing comprehensive and neutral information about what those interests require. However, it would be incongruous if the methods by which this information is gathered are themselves potentially dangerous to the children involved.

To explore these issues, the author undertook a quantitative review of all 181 substantive custody and access decisions which were reported in Canada's two commercial electronic case law databases during a five month period in 2009.² The objectives of this analysis were (i) to learn how many of the cases involved any form of direct evidence from the child or professional child-focused evidence, and (ii) to identify the relative prevalence of the various possible forms of children's evidence.

There were two central findings. First, only 45% of the judgments in the sample mentioned any children's evidence. In the remainder, the only evidence mentioned was the testimony of the adult parties or other evidence which was called and arranged by them. Second, when children's evidence is present, it is most likely to come in the form of an assessment prepared by a psychologist or social worker (30% of the cases). Direct evidence from children and legal representation of children were very rare. These two forms of children's evidence were referred to in only 3% and 7% of the 181 judgments, respectively. Several interesting variations in the prevalence of children's evidences in cases of different types and from different jurisdictions will also be discussed below.

2. CHILDREN'S EVIDENCE DEFINED

Children's evidence in a custody and access case is evidence which is not aligned with either of the competing adult litigants. It can be classified in terms of its *content* and in terms of its *source*. In terms of content, this evidence may be about the child's views and preferences regarding parenting. It can also consist of other information relevant to his or her interests. Very often, it includes both types of content.

There are three possible *sources* of children's evidence. First is *direct children's evidence* which passes unmediated from the child to the judge. An affidavit or written communication from a child intended for the judge would be direct children's evidence. A judicial interview of or courtroom testimony from a child are also in this category.

Second, children's evidence includes *child-focused evidence*, which comes from a professional with child expertise and a mandate to identify the best interests and/or preferences of the child. Child-focused evidence includes assessments or evaluations of the child's best interests or preferences conducted by social workers, psychologists, or psychiatrists. It also includes representations made by a lawyer for the child. Defining children's "evidence" to include a lawyer's submissions constitutes an unusually broad use of the term. However, such submissions are fundamentally of a kind with other types of children's evidence insofar as they are

² Child protection proceedings are not part of the subject matter of this article. The methodology is explained in greater detail below, at p. 10.

offer information to the custody or access decision-maker which is independent of the adult parties.

Third is *derivative* children's evidence. This includes information from child protection service employees, counsellors for children, and medical professionals who worked personally with the child. Individuals in this final group are not mandated to produce evidence for a custody or access dispute, but obtain such evidence incidentally while discharging other functions.³ Although they generally become witnesses in custody and access disputes after being called by one of the adult parties, they offer professional expertise. It is presumed that what they say reflects their professional opinions as opposed to a desire to help the adult parties who called them.

The diagram below illustrates the different types of children's evidence according to the "content" and "source" descriptors.

Children's Evidence: Content and Source		
Content →	Child's own views and preferences	Professional opinions about child's best interests
Source ↓		
Direct Evidence from Child	[always]	[not applicable]
Child-Focused Evidence	[usually contains both types of content, in varying proportions]	
Derivative Children's Evidence	[may contain both types of content, but often contains only one or the other]	

3. ADMISSIBILITY OF CHILDREN'S EVIDENCE IN CUSTODY AND ACCESS CASES

Children are almost never parties in custody and access litigation which concerns them.⁴ The admissibility of their evidence in these proceedings is therefore a live issue. In *Gordon v. Goertz*, the Supreme Court of Canada stated that "where the child is old and mature enough, his or her wishes and preferences" are among the factors a judge must consider before making a custody order.⁵ The applicable statutes generally use permissive language empowering judges to decide whether or

³ The literature does not generally group lawyers for children together with other professionals. However the researcher chose to do so because both are child-focused sources of information for the decision-maker. This distinguishes their evidence from both (i) that which adults choose to put forward, and (ii) that which comes directly from the child.

⁴ None of the 181 cases in the sample analyzed for this article included children as parties.

⁵ *Gordon v. Goertz*, 1996 CarswellSask 199, [1996] 2 S.C.R. 27, 19 R.F.L. (4th) 177, 1996 CarswellSask 199F (S.C.C.).

not children's evidence should be admitted on a case-by-case basis.⁶ In no part of Canada does a child of any age have an inalienable right to present direct or child-focused evidence in a custody or access dispute. However, many judges are reluctant to refuse admission of any evidence which appears relevant to the child's best interest,⁷ and some scholars have argued that the rules of evidence should be more liberally applied in this context.⁸

In exercising its discretion to admit or refuse direct children's evidence, a court will generally balance its probative value against its potential a) to do harm to the child, and/or b) to prejudice the interests of the adult parties. Child-focused evidence from a professional is less likely to harm the child. However, it can give rise to its own issues about the neutrality of the professional and the procedure which he or she used.⁹ Judicial opinion is mixed about whether a lawyer representing a child can directly state the child's views and preferences, or whether this constitutes an impermissible confusion of the roles of advocate and witness.¹⁰

Admitting derivative children's evidence does not mean subjecting the child to a new and potentially damaging investigation, insofar as this evidence has by definition already been obtained in another context. However, it can give rise to questions about whether the confidentiality owed to the child by the potential witness would be violated if it were to be used in the litigation. The law pertaining to the privilege for confidentiality seeks to balance these concerns.¹¹

⁶ E.g. British Columbia's *Family Relations Act*, R.S.B.C. 1996, c. 128 states at s. 24(1)(b) that the court "must consider . . . if appropriate, the views of the child." [emphasis added] Quebec's *Civil Code* states at art. 34: "The court shall, in every application brought before it affecting the interest of a child, give the child an opportunity to be heard if his age and power of discernment permit it." According to Rachel Birnbaum & Nicholas Bala, "The Child's Perspective On Representation: Young Adults Report On Their Experiences With Child Lawyers" (2009) 25 Can. J. Fam. L. 11, in five provinces judicial interviews are explicitly allowed by statute and in the others case law has found this procedure to be within the powers of the court.

⁷ *Redshaw v. Redshaw* (1985), 1985 CarswellSask 102, 47 R.F.L. (2d) 104 (Sask. C.A.) at para. 4 [R.F.L.]; *Gordon v. Gordon* (1980), 23 R.F.L. (2d) 266, 1980 CarswellOnt 341 (Ont. C.A.) at para. 11 [CarswellOnt]; *F. (J.K.) v. F. (J.D.)* (1988), 1988 CarswellBC 885, [1988] W.D.F.L. 799 (B.C. C.A.) at para. 17 [W.D.F.L.].

⁸ Rollie Thompson identifies this point of view without endorsing it in D. A. Rollie Thompson, "Are There Any Rules of Evidence in Family Law?" (2003) 21 Can. Fam. L.Q. 245 at section 2(c)(ii). Nicholas Bala and Annelise Saunders argue the position in "Understanding the Family Context: Why the Law of Expert Evidence is Different in Family Law Cases" (2002) 20 Can. Fam. L.Q. 277.

⁹ James G. McLeod, *Child Custody Law and Practice* (Scarborough, Ont.: Carswell, 1992) at section 1(4)(a). See also Thompson, *ibid.* and Bala & Saunders, *ibid.*

¹⁰ E.g., in Ontario, compare *Strobridge v. Strobridge*, 1994 CarswellOnt 400, 4 R.F.L. (4th) 169, 18 O.R. (3d) 753, 115 D.L.R. (4th) 489, 72 O.A.C. 379 (Ont. C.A.) and *Zamanchuk v. Baldwin*, 2000 CarswellOnt 1249. See also Dan Goldberg, "Representing Children in Custody & Access Proceedings" (The Voice of the Child, March 5 2009) [unpublished].

¹¹ Thompson, at 271–3; D. A. Rollie Thompson, "Five Vexing and Vexatious Issues in Family Law Evidence and Procedure" in Martha Shaffer ed., *Contemporary Issues in*

In Canadian jurisdictions in which there is a state-funded provider of child-focused evidence,¹² the state agency generally retains some discretion about how, when, and if children's evidence will be provided. For example, if a judge requests that Ontario's Office of the Children's Lawyer (OCL) provide legal representation for a child or an assessment of a child, the OCL itself decides whether and how to become involved.¹³ In British Columbia, by contrast, Family Justice Counsellors employed by the B.C. Ministry of the Attorney General cannot refuse to become involved.¹⁴ The B.C. *Family Relations Act* states that "the court may . . . *direct* an investigation" and that anyone who does so "*must* report the results of the investigation in the manner that the court directs."¹⁵ However, the judge cannot order that the report be completed within a specific time frame, and long delays result because demand exceeds supply.¹⁶ The agency retains discretion over *when* to provide services.

4. CHILDREN'S EVIDENCE: THEORY AND DEBATES

Commentators are generally enthusiastic about children's evidence in custody and access disputes. Many who focus on vindicating children's *rights* in legal disputes argue that a child should be entitled to a role or a voice in a procedure which touches him or her so closely.¹⁷ Those in this group often cite the United Nations Convention on the Rights of the Child, Article 12 of which states:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

Family Law: Engaging with the Legacy of James G. McLeod (Toronto Thomson-Carswell, 2007) at 3.

¹² According to Birnbaum & Bala, above note 6 at their note 15, "New Brunswick is the only province that does not provide any public funding for child custody assessments."

¹³ Ontario's *Courts of Justice Act* s. 89(3.1) states that "at the request of a court, the Children's Lawyer *may* act as the legal representative of a minor," and s. 112.(1) states that it "*may* cause an investigation to be made and may report and make recommendations to the court." [emphasis added]

¹⁴ Ministry of Attorney General (British Columbia) Justice Services Branch — Civil and Family Law Policy Office, *Family Relations Act Review Discussion Paper Chapter 8: Children's Participation*, 2007) at 9.

¹⁵ British Columbia *Family Relations Act*, R.S.B.C. 1996, c. 128, at ss. 15(1) and 15(2). Emphasis added.

¹⁶ Ministry of Attorney General (British Columbia) Justice Services Branch — Civil and Family Law Policy Office, above note 14.

¹⁷ Jodi Rebecca Fleishman, *Mandatory legal representation for children in custody, access and child protection proceedings*, (LL.M, McGill University (Canada), 2006) [unpublished]; Ronda Bessner, *The Voice of the Child in Divorce, Custody and Access Proceedings*. Department of Justice, Canada, 2002-FCY-1E (Ottawa, 2002) Online: dsp-psd.communication.gc.ca/Collection/J3-1-2002-1E.pdf at 2, citing C. Bernard, R. Ward, and B. Knoppers, "Best Interests of the Child Exposed: A Portrait of Quebec Custody and Protection Law" (1992-93), 11 Can. J. Fam. L. 57 at 136.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.¹⁸

This rights-based perspective, which author Ronda Bessner identifies as the “child liberationist or self-determination model,” may be becoming more prevalent.¹⁹

However, the more common argument for children’s evidence in custody and access disputes is that including it is in the best *interests* of the child. This position is consonant with a “child protectionist” model wherein the law focuses on children’s interests rather than their rights.²⁰ The argument from best interests for children’s evidence has two versions. First, it is said that a judge with access to children’s evidence is more likely to reach a conclusion which will be in the child’s best interests.²¹ Secondly, it is argued that participation in the process has salutary psychological effects for the child regardless of outcome, while conversely being excluded can have negative effects.²² After a comprehensive review of Canadian and international empirical evidence, Bala and Birnbaum recently concluded that “children want and need to be heard during times of parental separation and divorce. . . . they want their stories to be heard.”²³

Some authors are more sceptical about children’s evidence. A few have claimed that it is simply not necessary in order to do justice in custody or access disputes,²⁴ or that it is incompatible with our adversary civil justice system.²⁵ However the more common argument acknowledges the potential benefits but claims

¹⁸ *United Nations Convention on the Rights of the Child*, art. 12.

¹⁹ Bessner, above note 17 at 8; Ministry of Attorney General (British Columbia) Justice Services Branch — Civil and Family Law Policy Office, above note 14 at 2; Maria Coley, “Children’s Voices in Access and Custody Decisions: The Need to Reconceptualize Rights and Effect Transformative Change” (2007) 12 *Appeal, A Review of Current Law and Law Reform* 48 at para 86.

²⁰ Bessner, above note 17 at 9 and Fiona Kelly, “Conceptualising the child through an ‘ethic of care’: lessons for family law” (2005) 1 *International Journal of Law in Context* 375.

²¹ Coley, above note 19 at para 42; Special Joint Committee on Child Custody and Access, *For the Sake of the Children*. Senate and House of Commons, (Ottawa, 1998) Online: <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=147&Lang=1&SourceId=36230> in Chapter 2, Section B; Bessner, above note 17 at 32-33; Coley, above note 19 at 53.

²² Coley, above note 19 at pp. 54 and 56; Dale Hensley, “Role and Responsibilities of Counsel for the Child in Alberta: A Response to Professor Bala” (2006) 43 *Alta. L. Rev.* 871 at 880; Ministry of Attorney General (British Columbia) Justice Services Branch — Civil and Family Law Policy Office, above note 14 at 3 and, regarding the possible salutary effects of judicial interviews, at 13.

²³ Birnbaum & Bala, above note 6 at 40.

²⁴ This position is cited but not endorsed by Bessner, above note 17 at 1. See also Birnbaum & Bala, above note 6 at 14-15.

²⁵ Bessner, at 56, regarding judicial interviews.

that these are outweighed by the costs or risks to the child.²⁶ The most obvious dangers arise from children being asked to choose between their parents.²⁷ Being confronted with this question can be traumatic for the child and undermine the child's relationship with one or both of the parents.²⁸ Scholarly opposition is most common with regard to direct children's evidence such as the judicial interview or testimony in court.²⁹ Dale Hensley and Rachel Birnbaum are among those who suggest that the ideal form of children's evidence will come from a lawyer/social worker team.³⁰

Among those who agree that children's evidence should have a place in custody and access litigation, normative debates persist about the "when" and the "how."³¹ When a lawyer represents a child in a custody or access dispute, what role should that lawyer play?³² There is a discussion in the literature about what role the child's parents should play in choosing or paying for that lawyer.³³ With regard to the conduct of the lawyer once retained, the key alternatives seem to be (i) representing the child's views and preferences, or (ii) advocating a position which the lawyer feels to be in the child's best interests.³⁴ Counsel from Ontario's Office of the Children's Lawyer generally communicates the child's views and preferences if the child is capable of expressing them, without necessarily arguing that the court

²⁶ *Ibid.*, at 1, and Ministry of Attorney General (British Columbia) Justice Services Branch — Civil and Family Law Policy Office, above note 14 at 3.

²⁷ Nicholas Bala, "Child Representation in Alberta: Role and Responsibilities of Counsel for the Child in Family Proceedings" (2006) 43 Alta. L. Rev. 845 at 863, citing Richard A. Warshak, "Payoffs and Pitfalls of Listening to Children" (2003) 52 Family Relations 373; Robert E. Emery, "Children's Voices: Listening — and Deciding — is an Adult Responsibility — 45 Ariz. L. Rev. 621 2003" (2003).

²⁸ Bala, "Child Representation in Alberta," above note 27 at 863.

²⁹ Bessner, above note 17 at 56; Bala, "Child Representation in Alberta," above note 27; Special Joint Committee on Child Custody and Access, above note 21 in Chapter 2, Section B. However, Justice George Czutrin of the Superior Court of Justice in Ontario is among those who believe that judicial interview can be useful in certain cases (George Czutrin, "Remarks" (Family Law: The Voice of the Child (Remarks delivered at Law Society of Upper Canada Continuing Legal Education seminar, March 5th 2009.) [unpublished]).

³⁰ Hensley, above note 22 at 882; Rachel Birnbaum & Dena Moyal, "How Social Workers and Lawyers Collaborate" (2003) 21 Can. Fam. L.Q. 379.

³¹ Ministry of Attorney General (British Columbia) Justice Services Branch — Civil and Family Law Policy Office, above note 14 at 3.

³² Bessner, above note 17 at 15; Hensley, above note 22 at 878.

³³ Christine D. Davies, "Access to Justice for Children: The Voice of the Child in Custody and Access Disputes" (2004) 22 Can. Fam. L.Q. 153 at FN68; Bessner, above note 17 at 15 and 30-31.

³⁴ Several authors identify a third role — that of *amicus curiae* ("friend of the court.") E.g. Davies, above note 33; Bessner, at 20; Hensley, at 876; Goldberg, [unpublished] at 2b-5, and Bala, "Child Representation in Alberta," above note 27. See Hensley, above note 22 at 876 et seq.: differences between the 3 roles.

should give them effect.³⁵ Alberta lawyer Dale Hensley argues that lawyers should generally take instructions from child clients instead of substituting their own views.³⁶

In their recent article dealing with older children, Bala and Birnbaum generally endorse this position.³⁷ However, their interviews with children and a review of the empirical literature lead them to other equally important conclusions about how lawyers should approach the representation of children in custody and access disputes. They argue that making time to listen to and communicate with the child is of central importance, and that more interdisciplinary training is necessary to equip lawyers for this role.³⁸

For Nicholas Bala and a number of others, the nature of the lawyer's role depends on the nature of the child.³⁹ This leads to a second question. What characteristics of the child client are determinative when the lawyer is deciding whether to advocate the child's preferences or the child's interests as the lawyer perceives them?⁴⁰ In other words, which children have "capacity to instruct counsel?"⁴¹ Some would make rebuttable presumptions about a child's capacity based on the child's age,⁴² while others such as Andrew Kaufman would leave this to the discretion of counsel.⁴³

Custody and access assessments generate their own share of debates. Psychological tests are commonly deployed when psychiatrists or psychologists conduct assessments,⁴⁴ but there is substantial scepticism in some quarters about their util-

³⁵ Birnbaum & Moyal, "How social workers and lawyers collaborate" above note 30; Ministry of the Attorney General (Ontario) — Office of the Children's Lawyer, in *Policy Statement: Role Of Child's Counsel* (April 1, 2006 (revised)) 2006) at p. 3.

³⁶ Hensley, above note 22 at 879 and 884-5. However, Hensley also states at 882 that it is "inappropriate to appoint counsel . . . for a child just to find out what a young person thinks about the issues about which the judge must decide." See also Jeffery Wilson, Priscilla Darrell & Mary Tomlinson, *Wilson on Children and the Law*, 2nd (looseleaf) ed. (Toronto: Butterworths, 1986) at §6.24.

³⁷ Birnbaum & Bala, "The Child's Perspective On Representation: Young Adults Report On Their Experiences With Child Lawyers" above note 6 at 68.

³⁸ *Ibid.* at 66.

³⁹ Bala, "Child Representation in Alberta," above note 27 at 41.

⁴⁰ Bessner, above note 17 at 26; Quebec Bar Committee, "The Legal Representation of Children: A Consultation Paper prepared by the Quebec Bar Committee" (1996) 13 Can. J. Fam. L. 60 at 110-120.

⁴¹ Hensley, at 889 *et seq.*; Bala, "Child Representation in Alberta," above note 27 at 37 and 42-44.

⁴² Davies, above note 33 at FN22; Quebec Bar Committee, at 107-8; Birnbaum & Bala, "The Child's Perspective On Representation: Young Adults Report On Their Experiences With Child Lawyers."

⁴³ Hensley, above note 22 at 892; Andrew L. Kaufman, "Representing a Minor: A Shared Dilemma in Ontario and Massachusetts" (2008) 46 O.H.L.J. 159 at 171-2.

⁴⁴ Bow and Quinell, in their 2002 survey of assessments by psychologists, found that 90% conducted psychological tests on the parents and 38% conducted them on the child(ren). (James N. Bow & Francella A. Quinell, "A Critical Review of Child Custody Evaluation Reports" (2002) 40 Fam. Ct. Rev. 164 at 168). See also Barbara J.

ity.⁴⁵ While some say that more time should be taken in conducting assessments,⁴⁶ Rachel Birnbaum and her colleagues have suggested that shorter and more focused assessments can produce the same benefits at lower costs.⁴⁷ A number of scholars accept the value of custody and access assessment reports, but insist that they should not include “ultimate issue” recommendations about what the judge should order.⁴⁸

5. QUANTIFYING CHILDREN’S EVIDENCE

How prevalent are the various forms of children’s evidence in reported Canadian custody and access decisions? The literature contains many general observations on this point. However, little quantitative data is available.

Maria Coley claims that “children . . . are, for the most part, rendered invisible and voiceless in legal proceedings,” including custody and access.⁴⁹ Nicholas Bala reported in 2006 that “there has been an increase in the number of family law cases in Alberta where counsel is appointed to represent a child,” although child protection proceedings were included in the family cases to which he was referring. With regard to the relative prevalence of the various forms of children’s evidence, Christine Davies wrote that the three most common are judicial interviews, independent expert reports, and lawyers representing children.⁵⁰ B.C.’s Ministry of the Attorney General suggests that expert reports are the most common mechanism by which

Fidler & Rachel Birnbaum, “Child Custody Disputes: Private and Public Assessments” (2006) 25 Can. Fam. L.Q. 137.

⁴⁵ Fidler & Birnbaum, *ibid.*; Daniel W. Shuman, “The Role of Mental Health Experts in Custody Decisions: Science, Psychological Tests, and Clinical Judgment” (2002) 36 Fam. L.Q. 135; Timothy M. Tippins & Jeffrey P. Wittmann, “Empirical and Ethical Problems with Custody Recommendations” (2005) 43 Fam. Ct. Rev. 193; Rachel Birnbaum, Barbara Jo Fidler & Katherine Kavassalis, *Child custody assessments: a resource guide for legal and mental health professionals* (Toronto: Thomson Carswell, 2008) at 62.

⁴⁶ E.g. Mary Kay Kisthardt & Barbara Glesner Fines, “Making a Place at the Table” (2005) 43 Fam. Ct. Rev. 229 call for *groups* of experts to give opinions in custody and access cases.

⁴⁷ Rachel Birnbaum & Helen Radovanovic, “Brief intervention model for access-based postseparation disputes: Family and court outcomes” (1999) 37 Fam. & Concil.Cts.Rev. 504; Rachel Birnbaum, *Reaching beyond the past/focusing on the future: An empirical examination of two different approaches to access-based disputes*, (Ph D, University of Toronto (Canada), 2001) [unpublished]; Rachel Birnbaum & Willson McTavish, *Post-Separation Visitation Disputes: Differential Interventions (Background Paper 2001-FCY-6)*. Department of Justice Canada, 2001) Online: http://www.justice.gc.ca/eng/pi/pad-rpad/rep-rap/2001_6/toc-tdm.html; Rachel Birnbaum & Dena Moyal, “Visitation Based Disputes Arising on Separation and Divorce: Focused Child Legal Representation” (2002) 20 Can. Fam. L.Q. 37.

⁴⁸ E.g. Jonathan W. Gould & David A. Martindale, “A Second Call for Clinical Humility and Judicial Vigilance” (2005) 43 Fam. Ct. Rev. 253; Tippins & Wittmann, above note 45.

⁴⁹ Coley, above note 19 at 52.

⁵⁰ Davies, above note 33.

children's voices are heard in family disputes in that province.⁵¹ *Child Custody Law and Practice* appears to concur, stating "the law has now reached a point across the country where expert evidence is a common component of most contested custody and access cases."⁵² A number of scholars have observed that direct evidence from children is rarely present in custody and access disputes, either in the form of judicial interview or open testimony of the child.⁵³

Renée Joyal and Anne Queniat reviewed 300 Quebec custody and access cases from the period 1995–1998.⁵⁴ They found assessments in 12% of the cases, child testimony in 6%, and child legal representation in 3%. Because their sample included both settled and adjudicated cases, these figures do not directly respond to the research question about the prevalence of this evidence in adjudicated cases.⁵⁵ However, they do suggest that assessments were the most common form of children's evidence in Quebec in the late 1990s.

(a) Methodology

The researcher conducted a quantitative analysis of 181 reported judgments from 5 months of 2009 (January, February, March, April, and July) in order to assess the prevalence of children's evidence in adjudicated custody and access cases. The first months of 2009 were used because, when this research began, this was the latest period for which the cases were available in the databases. July was subsequently included along with the first four months of the year to increase the breadth of the sample in the event that cases adjudicated in mid-summer have different characteristics than other cases.⁵⁶ The category "custody and access cases" includes all those decisions in which (i) a judge makes a decision about what parenting arrangement would be in the best interests of a minor child or children, and (ii) no state agency is a party.

⁵¹ Ministry of Attorney General (British Columbia) Justice Services Branch — Civil and Family Law Policy Office, above note 14 at 4.

⁵² McLeod, above note 9 at 1(1).

⁵³ Regarding the rarity of judicial interviews, see Bessner, above note 17 at 32; Ministry of Attorney General (British Columbia) Justice Services Branch — Civil and Family Law Policy Office, above note 14 at 13, and Nicholas Bala, Victoria Talwar & Joanna Harris, "The Voice of Children in Canadian Family Law Cases" (2005) 24 Can. Fam. L.Q. at 245. Regarding testimony, see Bala, Talwar & Harris, *ibid.*, at 16; Thompson, above note 8 at 3(iii)(b), and McLeod, above note 9 at section 4(11)(a).

⁵⁴ Renée Joyal & Anne Queniat, "Enhancing the Child's Point of View in Custody and Access Cases in Quebec: Preliminary Results of a Study Conducted in Quebec" (2002) 19 Can. J. Fam. L. 173.

⁵⁵ The authors observed at page 182 that these forms of children's evidence were more likely to appear in the more contentious cases which settled later in the process or did not settle at all. (*ibid.*)

⁵⁶ This might be true if there are seasonal variations in the activities of Canada's family courts.

The first step in identifying these cases was to run keyword searches in the Westlaw Canada and Quicklaw databases.⁵⁷ Both databases use the words “custody and access” in the keywords assigned to a case record if the subject matter justifies it. This search produced 302 cases, but a number of the cases returned by these queries were not appropriate for the research question. The researcher excluded from the sample those cases in which the outcome was not based on a judicial decision about the best interests of the child. For example, an existing custody or access order under the *Divorce Act* can only be varied if the court concludes that there has been a “material change” in the “condition, means, needs or other circumstances of the child of the marriage” since the original order.⁵⁸ Judgments in which the status quo was preserved because this threshold was not passed were not included in the sample because no “best interests” analysis was made.

Motions to strike, stay, or dismiss pleadings and contempt motions arising from custody and access rulings were also excluded. So were applications under the *Convention on the Civil Aspects of International Child Abduction* (“Hague Convention”) and judgments which pertained only to procedure, costs, or jurisdictional questions. Appeals, consent orders, and uncontested trials were excluded, because they do not generally include either children’s evidence or new evidence of any kind.

Having excluded these cases, 181 remained. The sample included 33 cases from the Atlantic provinces, 5 from Quebec, 54 from Ontario, 41 from the Prairie provinces and the territories, and 48 from British Columbia. For each of these, the following information was gathered from the judgment:

1. *Jurisdiction.*

2. *Age of Child(ren).* In 174 of the 181 cases, the judgment reported the age or birth month of the child. Five judgments stated only that the child was born in a certain year; in these the child’s birth date was recorded as being July 1st of that year (the mid-point.) If a child’s birth date was only stated to be in a certain month, the birth date was recorded as being the mid-point of that month.

3. *Case Type.* It was recorded whether the dispute was about (i) custody, and/or (ii) time-sharing.⁵⁹ “Time-sharing” disputes are about what periods of time a child should spend with various adults. They include both access disputes (involving the time with a parent who does not have custody) and disputes among joint custodian adults about how the child’s time should be divided. Also recorded were whether a particular case involved grandparents of the child(ren) as parties, and whether it was a “mobility” case. Mobility cases were defined as those cases in which one

⁵⁷ The researcher had hoped to utilize the CanLii database as well, but CanLii cases do not have headnotes or keywords. FileMaker Pro was used to create a database of all the cases which responded to the queries.

⁵⁸ *Gordon v. Goertz*, 1996 CarswellSask 199, [1996] 2 S.C.R. 27, 19 R.F.L. (4th) 177, 1996 CarswellSask 199F (S.C.C.) at para. 9 [CarswellSask].

⁵⁹ Alberta’s *Family Law Act*, S.A. 2003, c. F-4.5 (Division 2) uses the word “guardianship” instead of “custody.”

of the parties intended to move to a location sufficiently distant to complicate time-sharing, or were resident at such a distant location at the time of trial.

4. *Types of Children's Evidence Present.* As noted above, children's evidence was defined to include the following three categories:

(i) *Direct children's evidence*, which came directly from the child to the judge. This included judicial interviews of children, affidavits from children, and courtroom testimony of children. It did not include documents or recordings of the child which the child did not intend to be heard or seen by the decision-maker.⁶⁰

(ii) *Child-focused evidence*, which came from a professional with child-related expertise and a mandate to identify the best interests and/or preferences of the child. This included representations from lawyers for children and custody or access assessments by social workers, psychiatrists, psychologists, or lawyers.

(iii) *Derivative children's evidence*, which included evidence from child protection staff, counsellors, or others with child-related professional expertise who worked personally with the child but did not have a mandate specific to the custody or access dispute. Individuals who opined about the best interests of a child without meeting the child were not considered sources of children's evidence.⁶¹ Nor were those who evaluated the parenting capacity of one or more adults without meeting the child involved.⁶² Finally, children's evidence was defined to exclude statements about a child's interests or preferences which came from individuals *without* child-related professional expertise, such as friends or relatives of the parties.⁶³

Many custody and access litigants return to court multiple times with regard to the same children. It is not uncommon for a decision to refer to some form of chil-

⁶⁰ E.g. text messages or emails from children to others which adults printed off and brought to court (as in *S.C. v. J.C.*, 2009 SKQB 87, [2009] S.J. No. 121 (Sask. Q.B.) at para. 66, [S.J. No.]).

⁶¹ E.g. *Wiebe v. Wiebe* (2009), 2009 CarswellSask 30 (Sask. Q.B.); *Petrie v. Brown* (2009), 2009 CarswellOnt 1477 (Ont. C.J.).

⁶² E.g. *S.C. v. J.C.*, 2009 SKQB 87, [2009] S.J. No. 121 (Sask. Q.B.) at paras 40 and 51 [S.J. No.].

⁶³ Two examples of this type are *J.H. v. L.D.*, 2009 NLTD 54, [2009] N.J. No. 109, ¶13 (N.L. T.D.) [N.J. No.] and *M. (R.V.) v. L. (W.F.)* (2009), 2009 CarswellAlta 315 (Alta. Q.B.) at paras. 51 and 55 [CarswellAlta]. In these cases, individuals who had supervised access visits but who lacked child-related professional expertise testified. As noted in Thompson, above note 8 at pp. 288–290, statements of this nature are often admitted as a matter of evidence law under the “state of mind” exception to the hearsay rule. For the purposes of this article, however, they were not considered “children’s evidence.”

dren's evidence originally presented at an earlier hearing. The researcher distinguished between cases in which child-focused evidence was prepared "fresh" for the most recent hearing and those in which it was from a previous proceeding. Conversely, in a number of cases there was no children's evidence available to assist the judge in making the immediate custody or access decision, but the judgment ordered that children's evidence be provided or noted that it would be available at a future hearing. These cases with "pending" children's evidence were also distinguished from those in which the evidence was actually available to assist the decision being made.

(b) Findings

(i) Prevalence of Children's Evidence

The following chart reports the prevalence of the various types of children's evidence in the sample of custody and access decisions. This chart includes cases in which children's evidence from an earlier proceeding was mentioned, but excludes those in which it was said that the children's evidence was being prepared or would be available at a later date.⁶⁴

Table 1: Prevalence of Different Forms of Children's Evidence

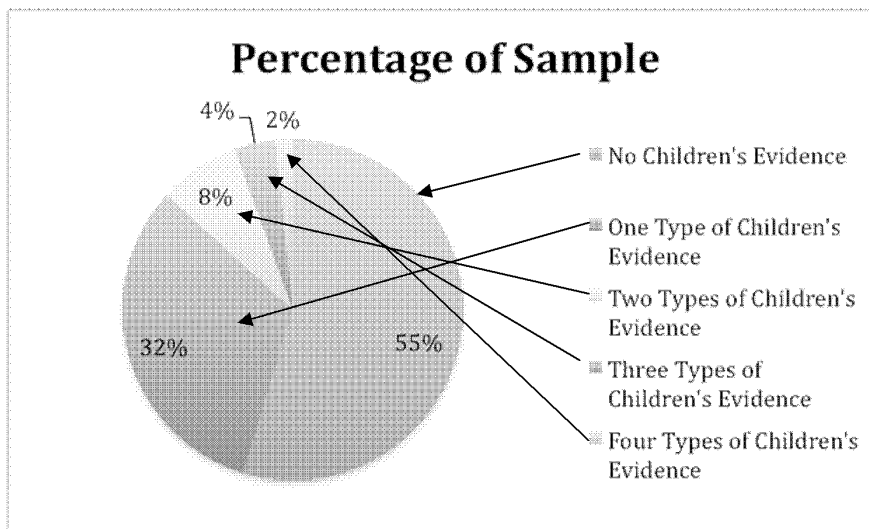
	Direct Children's Evidence	Child- Focused Evidence: Lawyer	Child- Focused Evidence: Assessment	Derivative Children's Evidence	Any Form of Children's evidence
Mentioned in judgment:	5 cases (3%)	13 cases (7%)	54 cases (30%)	47 cases (26%)	82 cases (45%)
Not men- tioned in judgment:	176 cases (97%)	168 cases (93%)	127 cases (70%)	134 cases (74%)	99 cases (55%)
<i>Total:</i>	181 cases				

The majority of the custody and access judgments in the sample (55%) did not mention children's evidence of any kind. Despite the legal primacy of children's interests, and despite the broad admissibility and general enthusiasm for this evidence, children's evidence does not appear to be present in the majority of custody and access adjudications in the sample.

The number of cases in which there was any form of children's evidence (82) is less than the sum of the other four columns in Table 1 (119). This is because a

⁶⁴ There were 13 such cases in the sample.

number of cases had multiple forms of children's evidence. *Watkins v. Watkins*, [2009] O.J. No. 1020, a case in which a mother sought to vary a joint custody order, included four forms of children's evidence. In this case assessments were conducted by two social workers, one of whom was retained by the Office of the Children's Lawyer. A psychiatrist who had diagnosed the child testified, as did a representative of the Catholic Children's Aid Society who had conducted a child protection investigation. Finally, testimony was heard from the principal of the children's school. A total of 22 cases had multiple forms of children's evidence present. Other cases involved multiple instances of one type of children's evidence. The pie chart below shows that, while most cases had no children's evidence or one type present, a significant number included more than one type of children's evidence.



Relatively few Canadian custody and access cases seem to involve a “battle of the experts,” with various professionals taking contradictory positions about what would be best for the child. There were only three cases in which one expert critiqued or repeated an assessment conducted by another.⁶⁵ The more common expla-

⁶⁵ *Johal v. Johal*, 2009 BCSC 139, [2009] B.C.J. No. 195 (B.C. S.C.); *McGee v. Vajda*, 2009 BCSC 945, [2009] B.C.J. No. 1404 (B.C. S.C.); *G.C. v. I.C.*, 2009 BCPC 149, [2009] B.C.J. No. 1003 (B.C. Prov. Ct.).

nation for the multiple assessments was that the earlier ones had “gone stale” by the time of the hearing because facts had changed.⁶⁶ In at least 8 cases, the children’s evidence present had been prepared prior to an earlier judicial hearing.⁶⁷

(c) Types of Evidence

Direct children’s evidence was mentioned in only 5 judgments, 3% of the sample. An affidavit from a child was admitted in one case,⁶⁸ and in two others, both from Quebec, the child testified.⁶⁹ In *T.B.M. v. C.J.M.*, the 14 year old child wrote a “short note to the Court” in which he “asked to speak to the Court to clear up confusion resulting from things said.”⁷⁰ The judge, however, declined to interview the child or to allow him to testify, and instead arranged for the psychologist assessor to speak to the child. In *E.A. v. D.D.P.*, the mother attached an undated note which was purportedly from the child to one of her affidavits. The judgment reproduced the note, but observed that it was only “allegedly” from the child.⁷¹

Although the judicial interview has generated a certain amount of commentary,⁷² this form of children’s evidence was not found within the sample.

Legal representation of the child was found in 13 cases, 7% of the sample. In the five Ontario cases, the lawyer was appointed by the Office of the Children’s

⁶⁶ E.g. *K.L.P. v. J.F.P.*, 2009 BCSC 484, [2009] B.C.J. No. 697 (B.C. S.C.); *M.N.M.A. v. S.D.A.*, 2009 BCSC 450, [2009] B.C.J. No. 662 (B.C. S.C.). The author’s prior research (Noel Semple, *The Eye Of The Beholder: Professional Opinions About The Best Interests Of A Child*, (LL.M. Thesis, Osgoode Hall Law School, York University, 2009) [unpublished] Online: <http://www.noelsemple.ca/?p=47#more-47>) suggests that, with regard to assessments conducted by Ontario’s Office of the Children’s Lawyer, the period of time elapsed between the completion of the assessment and the hearing of the case often leads to the assessor’s recommendation being rejected by the judge.

⁶⁷ *L. (A.G.) v. D. (K.B.)* (2009), 2009 CarswellOnt 188 (Ont. S.C.J.); additional reasons at (2009), 2009 CarswellOnt 1764 (Ont. S.C.J.); additional reasons at (June 9, 2009), Doc 99-FP-246860FIS (Ont. S.C.J.); *Rosenow v. Dooley* (2009), 2009 CarswellMan 4; *K.L.P. v. J.F.P.*, 2009 BCSC 475, [2009] B.C.J. No. 696 (B.C. S.C.); *Lien v. Lorenz*, 2009 BCSC 359, [2009] B.C.J. No. 510 (B.C. S.C.); *M.N.M.A. v. S.D.A.*, 2009 BCSC 450, [2009] B.C.J. No. 662 (B.C. S.C.); *Droit de la famille — 09744*, 2009 QCCS 1441, [2009] Q.J. No. 2804 (Q.S.C.); *Foster v. Foster* (April 22, 2009), Doc. F122/08, [2009] O.J. No. 1616 (O.S. C.J.); *S. (J.) v. S. (G.J.)* (2009), 2009 CarswellBC 587 (B.C. S.C. [In Chambers]).

⁶⁸ *Holmes v. Holmes* (2009), 2009 CarswellOnt 87 (Ont. S.C.J.).

⁶⁹ *Droit de la famille — 09438*, 2009 QCCS 835, [2009] Q.J. No. 1587 (Ont. S.C.)

⁷⁰ *T.B.M. v. C.J.M.*, 2009 BCSC 974, [2009] B.C.J. No. 1456 (B.C. S.C.).

⁷¹ *E.A. v. D.D.P.*, 2009 CarswellBC 766, [2009] B.C.J. No. 599 (B.C. S.C.).

⁷² Above, note 30.

Lawyer.⁷³ In a Nova Scotia case the lawyer was identified as a *guardian ad litem*,⁷⁴ and in two Yukon Territory cases the lawyer was identified as “child advocate.”⁷⁵ In the other 5 cases, counsel for the child was listed in the same fashion as counsel for the parties.

Assessment was the most common form of children’s evidence found in the sample; it appeared in 54 cases (30%). Twenty judgments mentioned assessments conducted by psychologists and 23 mentioned assessments by social workers. Two cases from British Columbia involved “views of the child” reports from lawyers who did not represent the children in the litigation.⁷⁶ In the remainder of the cases it was not clear which type of professional conducted the assessment.

Derivative children’s evidence appeared in roughly a quarter of the cases. As noted above, this category consisted of evidence from professionals who had contact with the child but who were not retained for the specific purpose of resolving the custody or access dispute.

⁷³ *MacDonald v. MacDonald*, 2009 CarswellOnt 1839, [2009] O.J. No. 1381 (Ont. S.C.J.); *Darby v. Darby* (2009), 2009 CarswellOnt 197 (Ont. S.C.J.); *L. (A.G.) v. D. (K.B.)* (2009), 2009 CarswellOnt 188 (Ont. S.C.J.); additional reasons at (2009), 2009 CarswellOnt 1764 (Ont. S.C.J.); additional reasons at (2009), 2009 CarswellOnt 3273 (Ont. S.C.J.); *White v. Lavinskas* (2009), 2009 CarswellOnt 278 (Ont. S.C.J.); additional reasons at (2009), 2009 CarswellOnt 1666 (Ont. S.C.J.); *Ward v. Swan* (2009), 2009 CarswellOnt 4459 (Ont. S.C.J.).

⁷⁴ *Nova Scotia (Minister of Community Services) v. K.H.*, [2009] N.S.J. No. 92. This judgment involved a custody dispute between parents as well as a child protection proceeding. The *guardian ad litem* was appointed for the protection proceeding but also participated in the private custody dispute.

⁷⁵ *J.M.H. v. E.C.H.*, 2009 YKSC 35, [2009] Y.J. No. 63 (Y.T. S.C.); *G. (K.R.) v. R. (R.)* (2009), 2009 CarswellYukon 61 (Y.T. S.C.).

⁷⁶ *Lundell v. Beach*, 2009 BCSC 170, [2009] B.C.J. No. 270 (B.C. S.C.) and *M.E.C. v. D.E.J.*,

Statutes, Regulations and Rules Cited:

Family Relations Act, RSBC 1996, C. 128, s. 9, s. 15, s. 20, s. 24, s. 30, s. 35, s. 57

Rules of Court, Rule 3, Rule 44, Rule 51A, Rule 52, Rule 57, Rule 60

Counsel:

Counsel for the Plaintiffs: M.D. Brooke.

Counsel for the Defendant, Ericka Genna Beach: J.D.R. Landis.

Table 2: Breakdown of Derivative Children's Evidence

	Number of Cases	Percentage of the Sample in Which it Appeared
Family Doctor or Other Medical Professional	8	4%
Child Protection Worker	21	12%
Counsellor or Therapist for Child or Neutral Access Supervisor	10	6%
School Employee	8	4%

(d) Type of Case

The following table indicates the prevalence of children's evidence in the cases of various types. The definitions of the case types were discussed earlier. Note that the total number of cases in the table below exceeds the total number in the sample, because some cases fit in multiple categories. For example, in four cases in the sample, grandparents were contesting custody.⁷⁷

⁷⁷ *Mingo v. Solomon* (July 17, 2009), Doc. F141/07, [2009] O.J. No. 3031 (Ont. S.C.J.); *Partridge v. Partridge*, 2009 MBQB 196, [2009] M.J. No. 273 (Man. Q.B.); *C.B. v. S.B.*, 2009 YKSC 12, [2009] Y.J. No. 22 (Yukon S.C.); *Ward v. Swan* (2009), 2009 CarswellOnt 4459 (Ont. S.C.J.).

Table 3: Prevalence of Children's Evidence by Case Type

	Custody Contested	Only Time Sharing Contested	Grandparent Cases	Mobility Cases
Children's Ev. Mentioned in Judgment	53 cases (50%)	21 cases (36%)	2 cases (29%)	21 cases (42%)
Children's Ev. Not Mentioned in Judgment	52 cases (50%)	38 cases (64%)	5 cases (71%)	29 cases (58%)
<i>Total</i>	105 cases	59 cases	7 cases	50 cases

50 of the custody and access cases in the sample, or 28%, had a mobility element as defined above. Given the small sizes of the case type sub-groups, it cannot be conclusively said that grandparent or mobility cases are more or less likely than the average case to include children's evidence.

However, the percentage of time-sharing cases with children's evidence is noticeably lower than that for the custody cases. It is plausible that custody cases are perceived by the parties as more important to themselves and to their children, and therefore more likely to justify the costs and risks of bringing forward children's evidence. To determine whether the phenomenon observed in the sample is likely to occur throughout the population, the author conducted a chi-square statistical test. A level of statistical significance of .05 was chosen, meaning that the author would assume that the difference in averages occurred by chance unless the statistical test indicated a 95% likelihood that this was not the case. On this standard, the null hypothesis (that there is no difference between the population of "custody contested" cases and the population of "only time sharing contested" cases) cannot be rejected.⁷⁸

(e) Geographic Areas

The following chart indicates what percentage of the cases in the various jurisdictions included any form of children's evidence.

⁷⁸ However, the chi-square result came close to establishing statistical significance ($X^2_{(1)} = 3.4$, $p = 0.066$).

Table 4: Prevalence of Children's Evidence In Geographic Areas

Geographic Area →	Atlantic Provinces	Quebec	Ontario	Prairie Provinces and Territories	British Columbia
Children's Ev. Mentioned in Judgment	13 cases (39%)	4 cases (80%)	29 cases (54%)	11 cases (27%)	25 cases (52%)
Children's Ev. Not Mentioned in Judgment	20 cases (61%)	1 case (20%)	25 cases (46%)	30 cases (73%)	23 cases (48%)
<i>Total</i>	33 cases	5 cases	54 cases	41 cases	48 cases

Given the size of the sample, caution is necessary in seeking region-specific conclusions about the prevalence of different types of children's evidence. However, two observations can be made about legal representation of children. Among the 48 British Columbia cases, there were none in which a child was represented by a lawyer. In 23 of the 25 B.C. cases in which there was children's evidence, there was an assessment. By contrast, of the very small Quebec sample of 5 cases, lawyers represented children in 3 cases and in 2 cases direct children's evidence was heard.

A chi-square test was again used to determine whether the differences between jurisdictions were statistically significant. The research hypothesis was confirmed at the .05 level of statistical significance.⁷⁹ Specifically, it can be said that children's evidence is less common than the national average in the prairies and territories, and more common than the national average in Ontario. The relatively high prevalence in Ontario could be due to the existence of the Office of the Children's Lawyer.

(f) Age of Children

The average number of children in the cases in the sample was 1.6, and the average age of the children was 8.21 years. The researcher hypothesized that there would be a positive correlation between the average age of the children in a given case and the likelihood of children's evidence being heard. Clearly children who are pre-verbal are not likely to be helpful sources of evidence. It has been said that

⁷⁹ $\chi^2_{(4)} = 10.97, p = 0.026.$

the preferences of older children are more important in custody and access cases,⁸⁰ and one would therefore expect to find more evidence being heard from older children. The research hypothesis was that the average age of children (or the age of the only child) in cases with children's evidence *was* mentioned is greater than the average of children in those cases in which it *was not* mentioned.

The data supports this proposition. Within the 81 cases containing information about child age in which children's evidence was mentioned, the average age of the children was 3191 days (8.76 years). Among the 98 cases with age information and no children's evidence mentioned, the average age was 2547 days (6.99 years).

To determine the likelihood that this difference would persist across the entire population (as opposed to the null hypothesis that it merely represents a coincidence in the sample), a t test for independent means was conducted. A level of statistical significance of .05 was used, which means that the researcher would assume that the difference in averages occurred purely by chance unless the statistical test indicated a 95% likelihood that this was not the case. On this standard, the research hypothesis is a more likely explanation than the null hypothesis.⁸¹

The researcher then categorized the cases based on the average age of the children in years. The following table suggests increases in the prevalence of children's evidence both as one moves from cases with an average age of less than 4 years to those of 4–10 years, and again as one moves from those cases to cases with children older than 10 years.

Table 5: Prevalence of Children's Evidence by Child Age			
Age of Child →	Less than 4 years	Between 4 and 10 years	Over 10 years
Children's Ev. Mentioned in Judgment	6 cases (19%)	43 cases (44%)	32 cases (64%)
Children's Ev. Not Mentioned in Judgment	25 cases (81%)	55 cases (56%)	18 cases (36%)
<i>Total</i> ⁸²	31 cases	98 cases	50 cases

⁸⁰ E.g. *Kaplanis v. Kaplanis* (2005), 2005 CarswellOnt 266, 10 R.F.L. (6th) 373, 249 D.L.R. (4th) 620 (Ont. C.A.) at para 13 [D.L.R.].

⁸¹ $t_{(177)} = 3.0965$, $p = 0.0011$.

⁸² In two cases in the sample, there was no information about the children's age: *Escandor v. Little* (2009), 2009 CarswellAlta 1201 (Alta. Q.B.); *Mansfield v. Rasmussen*, [2009] O.J. No. 3942, 2009 ONCJ 443 (Ont. C.J.).

(g) Limitations

This research focused exclusively on adjudicated and reported custody and access cases. The overwhelming majority settle, either without a trial or even without any form of judicial involvement.⁸³ This research does not directly reveal how and to what extent parents incorporate children's evidence in reaching settlement terms.

This research relied on a sample of reported cases as an indicator of what is actually happening in Canadian courtrooms. Two inherent limitations of this methodology must be identified. First, it is possible that children's evidence was present in certain cases but the judge chose not to mention it in the case report. However, children's evidence is generally welcomed by judges when available, and considered an important source of facts and analysis in a custody or access case given that the sole legal criterion is the best interests of the child. When children's evidence was mentioned in a case report, it usually received at least 2-3 paragraphs of discussion in the judgment. It is therefore unlikely that there were many cases in which it was present but the judge did not think that it merited so much as a mention in the reasons.

Second, the sample only included decisions from the Quicklaw and Westlaw databases. Not all adjudicated decisions are reported in online databases, although running the queries in both databases helped to counteract the effect of possible geographic or other biases in either of them.⁸⁴ While the sample is jurisdictionally broad, it is not entirely demographically representative of the population of Canada. Among the cases meeting the search criteria, Quebec was strongly under-represented in Quicklaw, and entirely absent from the Westlaw Canada database.⁸⁵

6. DISCUSSION AND CONCLUSION

(a) Why is the Child so Often Silent?

The clearest finding from this study was that the primacy of the child in custody and access doctrine is not usually reflected in the evidence which is available to the decision-maker in the average case. While a judge deciding such a case is likely to hear a great deal about the child's best interests from the parties and their

⁸³ Precise figures regarding the rate of settlement are not available. However, a recent Ontario survey found that 3% of all family law cases (including those without child-related issues) commenced in 5 typical Ontario family courts went to trial. (Alf Mamo, Peter Jaffe, and Debbie Chiodo, *Recapturing and Renewing the Vision of the Family Court*. (Toronto: Ministry of the Attorney General (Ontario), 2007). Location of file: <http://www.crvawc.ca/documents/Family%20Court%20Study%202007.pdf>) Another source suggests that in Quebec, "85% to 90% of couples who separate or divorce are able to reach agreements relating to corollary measures, such as custody and access." (Joyal & Queniert, above note 54 at 174.)

⁸⁴ 116 of the cases in the sample were present in both Quicklaw and Westlaw and had the words "custody and access" among their keywords in both databases. For 65 of the cases, these conditions were met for only one of the databases.

⁸⁵ For the period in question, only 5 Quebec cases were found, or 2.8% of all the cases in the sample. Per <http://www.statcan.gc.ca/pub/91-215-x/2009000/t002-eng.htm>, Quebec has approximately 23.2% of Canada's population.

chosen witnesses, the majority of reported judgments do not indicate that he or she had access to any *children's evidence* as that term was defined above.

This finding was somewhat surprising because, although there is substantial ambivalence about direct children's evidence, most commentators are relatively enthusiastic about the potential of child-focused evidence to improve outcomes. As noted above, it is usually admissible as a matter of evidence law. Why was there no children's evidence mentioned in the majority of the judgments?

Resource constraints are one plausible explanation. Child-focused evidence requires that the parties or the state pay a lawyer, social worker, or psychologist to obtain and present it. The Ontario Bar Association recently reported that 40% of all civil litigants in Canada are self-represented, and that the rate in family court is even greater than this average.⁸⁶ Many if not most of the unrepresented cannot afford lawyers;⁸⁷ one Ontario survey of family court litigants without lawyers found that 83% stated that they were unable to afford the fees.⁸⁸ Adults who cannot afford to retain lawyers themselves are not likely to be able to afford any form of child-focused evidence.

Children's evidence may also be state-funded, but resources are limited here too. Chief Justice of Ontario Warren K. Winkler's comments at the 2008 Opening of the Courts speech implicitly acknowledged this reality:

Family law matters which are now understood to be complex, social problems that require multi-disciplinary and co-ordinated responses must attract the resources they require. Indeed, the pace of new funding must increase, in recognition of the fact that judicial intervention is only part of what is needed to cope with family break-down and child protection.⁸⁹

Alberta and British Columbia cut back funding for child legal representation during the 1990s.⁹⁰ Even when there is money to pay for child-focused evidence, there may not be anyone available to provide it. For example, there is evidence that demand for assessments exceeds supply in many parts of the country. Irwin Butkowsky, a prominent private custody assessor in Ontario, noted a backlog in a recent conference. Using an example from his own practice, Mr. Butkowsky stated that if he is retained to conduct the assessment, he expects to be able to begin the

⁸⁶ Ontario Bar Association, *Getting It Right: The Report of the Ontario Bar Association Justice Stakeholder Summit*. Ontario Bar Association, (Toronto, 2008) Online: http://www.oba.org/en/pdf/Justice_Summit_sml.pdf at 8.

⁸⁷ D. A. Rollic Thompson & Lynn Reiersen, "A Practicing Lawyer's Field Guide to the Unrepresented" (2002) 19 Can. Fam. L.Q. 529 at 529-530.

⁸⁸ Anne-Marie Langan, "Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario" (2005) 30 Queen's L.J. at 832.

⁸⁹ Warren K. Winkler, "Opening of the Courts Speech" September 9, 2008 2008 [unpublished].

⁹⁰ Hensley, above note 22 at 4-5; Bala, "Child Representation in Alberta" above note 30; Ministry of Attorney General (British Columbia) Justice Services Branch — Civil and Family Law Policy Office, above note 14 at 12.

process only 10–12 weeks later.⁹¹ In the Manitoba case of *Poste v. Mitchell-Poste*,⁹² the judge ordered an assessment and went on to state that he was “mindful of the delay which will ensue given the backlog of outstanding assessments at Family Conciliation Services.” Such a backlog is a disincentive for the parties or court to seek child-focused evidence, because it means that doing so will delay the resolution of the case.

(b) Protectionism Ascendant?

At the outset, this article reviewed liberationism and protectionism, the two dominant schools of thought regarding the place of children in the legal system.⁹³ The prevalent forms of children’s evidence in the cases are more consistent with the “child protectionist” model than with the “child liberationist” model. Child-focused evidence in the form of assessments was by far the most common form of children’s evidence. Assessments by definition seek to identify the best interests of the child, or at least present information which is relevant to those interests. While the assessment process includes ascertaining the child’s views and preferences if he or she can express them, these views and preferences are not treated as dispositive of the question of the child’s interests.⁹⁴ Insofar as the child controls neither the process nor the outcome of an assessment, this form of evidence is most compatible with the child protectionist school.

Representation of the child by a lawyer came a distant second among the most prevalent forms of children’s evidence. As noted above, there is a live debate about whether and to what extent lawyers should take instructions from their minor clients in these disputes, as opposed to advocating their best interests as the lawyer understands them. The approach taken by such a lawyer in Canada today depends on the lawyer, the child, and the jurisdiction. While a hypothetical child liberationist would approve of a lawyer who takes the child’s instructions, a child protectionist would be more likely to endorse “best interests advocacy.”

Least common of all was direct children’s evidence, which was mentioned in only 3% of the cases in the sample. Direct children’s evidence is most compatible with the child liberationist school of thought identified above. Those who believe that children should be treated as active rights-holders in custody and access disputes, are also likely to believe that the child should speak directly to the decision-maker.⁹⁵ The paucity of this type of evidence suggests that the judges and others who make decisions about children’s evidence have not embraced the child libera-

⁹¹ Irwin S. Butkowsky, “Remarks” in *Family Law: The Voice of the Child* (Remarks delivered at Law Society of Upper Canada Continuing Legal Education seminar, March 5th 2009.)).

⁹² *Poste v. Mitchell-Poste*, 2009 CarswellMan 368, ¶51.

⁹³ Above, at page 5.

⁹⁴ Fidler & Birnbaum, above note 44, at section 2(e). An exception is “views of the child” assessments conducted in British Columbia. These generally report on the child’s preferences without expressing an opinion for or against them.

⁹⁵ For example, in a recent article, Nick Bala and Rachel Birnbaum observe “growing acceptance of the legal principle that children have the *right* to be heard when post-separation parenting arrangements are being made.” Birnbaum & Bala, “The Child’s

tionist doctrine that children should be active participants in important decisions that affect them, such as custody and access litigation.

There is now a growing breadth and depth of scholarship on children's evidence in Canadian custody and access litigation. This article has sought to contribute to the literature by deploying a quantitative methodology to answer research questions about the prevalence of various types of children's evidence in reported decisions. The article is also part of an ongoing personal research agenda. Through the use of qualitative and quantitative empirical methods, can we better understand how custody and access cases are actually resolved in and out of court? What are the costs and benefits of the status quo for the children involved? Are improvements possible despite resource constraints? While quantitative analysis of reported cases can not reveal what's happening "on the ground" with perfect clarity, it does offer a useful perspective. From this vantage point, it appears that despite the legal pre-eminence of children's interests in custody and access law, the surprising reality is that the children themselves are usually silent.

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